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In The

Supreme Court of the United States

I-125 PROPONENTS' COMMITTEE,

Petitioner,

v.

MONTANA CHAMBER OF COMMERCE, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioner submits this brief in reply to certain erroneous contentions made in the respondents' opposition. First, respondents mistakenly contend that I-125 prohibits corporate speech on ballot initiatives. That argument ignores the clear distinction between an outright ban on corporate spending, which the Court struck down in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), and a segregated fund requirement, which the court upheld in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). As this Court noted in *Federal Election Comm. v. Massachusetts Citizens for Life, Inc.* ("MCFL"), 479 U.S. 238 (1986), a requirement of using segregated funds "is of course distinguishable from the complete foreclosure of any opportunity for political speech that we invalidated in the state referendum context in *First National Bank of Boston v. Bellotti*." 479 U.S. at 259 n.12.

The segregated fund option means that voters are not deprived of the corporate viewpoint on ballot initiatives. Under I-125, a corporation may still use its general treasury funds to pay for solicitations to the corporation's members, shareholders, and employees seeking donations to the segregated fund, and otherwise to administer the fund. Tr. 465, 10/15/98 (Testimony of Ed Argenbright). Corporate officers are free to participate in the management of the segregated fund. Tr. 485, 10/15/98 (Testimony of Ed Argenbright). It is thus wholly inaccurate to contend that a corporation's segregated fund does not give the corporation a voice in initiative campaigns.

Respondents' complaints about the difficulty of raising funds through a segregated account or PAC are not supported by the record. Very few of the respondents made any meaningful effort to establish a segregated fund in the wake of I-125, preferring, instead, to concentrate their efforts on seeking to overturn I-125. Those few who did make an effort to raise funds within the bounds of I-125 had a remarkable degree of success, considering that 1998 was the first election season governed by I-125.

For example, the Montana Education Association ("MEA") established a ballot issue PAC that in 1998 gave a total of $32,000 to two ballot issue campaigns concerning taxation issues. Tr. 190, 192, 10/13/98 (Testimony of Eric Feaver). This may be compared to MEA's expenditures on ballot measure campaigns from 1990 through 1996, before I-125 was enacted: in all but one of those years, MEA's ballot campaign spending was less.[1]

The Montana Mining Association ("MMA") also established a segregated fund that raised funds similar to those spent by MMA prior to I-125's enactment. In 1996, MMA spent $10,140 opposing I-122, a water quality initiative that the MMA considered very important to its members. Tr. 76-77, 10/21/98 (Testimony of Jill Andrews). After the enactment of I-125, MMA established a ballot measure PAC that had raised over $10,000 to oppose another mining initiative, I-137. Tr. 63, 10/21/98 (Testimony of Jill Andrews).

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[1] *See* Tr. 202, 10/13/98 (Testimony of Eric Feaver) (in 1990, MEA spent $11,600 on two initiatives; in 1992 and 1993, MEA made no expenditures on ballot initiatives; in 1994, MEA spent $74,400 on two initiatives).

Indeed, by requiring funds to be raised from interested individuals rather than through a corporate checkbook, I-125 stimulated individual participation in ballot initiatives in Montana during the short time it was in effect. For example, in 1998 a six-mill levy supporting university funding was on the ballot for renewal. Because of I-125, the number of individuals contributing to the six-mill levy campaign in 1998 was 20 times higher than 1988, when the six-mill levy was last renewed: 600 individuals contributed in 1998, compared to only 30 in 1988. Tr. 37, 10/13/98 (Testimony of Senator Bob Brown); *see also* Tr. 1078, 10/20/98 (Testimony of C.B. Pearson). Senator Bob Brown, one of respondents' witnesses, acknowledged that, despite I-125's limits on corporate general treasury spending, he had already succeeded at the time of trial in raising $73,000 to promote the six-mill levy, compared to $133,000 collected for the previous renewal. Tr. 27, 10/13/98. Senator Brown confirmed that funds were being raised successfully from individual officers of corporations that had previously used general treasury funds to make contributions; for example, the campaign had solicited contributions from officers of Montana Power Company "and we've done pretty well from them as individuals." Tr. 39, 10/13/98; *see also* Tr. 190, 10/13/98 (plaintiff Montana Education Association established ballot issue PAC which contributed $5,000 to six-mill levy campaign).

Some of the plaintiffs below, on the other hand, made no effort to take advantage of the options open to them under I-125. While contending that a 1998 initiative to ban new open pit cyanide mines, I-137, was of great concern to his company, Ray Lazuk admitted that his

company never so much as wrote a letter to its employees informing them about I-137 or asking for their support in opposing it, all of which is entirely permissible under I-125. Tr. 29, 10/21/98. Lazuk's company, Golden Sunlight Mines, did not establish a segregated fund, nor did it ask its huge parent company, Placer Dome, whether the parent company had segregated funds available for opposition efforts. Tr. 36-37, 10/21/98 (Testimony of Ray Lazuk). The company did not even include any mention of I-137 in the regular employee newsletter. Tr. 29, 10/21/98 (Testimony of Ray Lazuk). Montana's Secretary of State, Mike Cooney, observed that corporations appeared to be deliberately avoiding lawful means of participating in 1998 ballot campaigns to improve their litigation position in the I-125 lawsuit. Tr. 884-885, 10/20/98 (Testimony of Secretary of State Mike Cooney).

In short, under I-125, corporations may spend as much as they wish as long as the funds are collected from individuals who support the electoral goals of the corporation. The only limit on their spending is the persuasive power of their ideas in inspiring individuals to contribute. By complaining that it is more difficult to raise funds from individuals than from the corporate treasury, respondents demand not a mere right to speak, but the right to speak using the funds of investors or customers who have no interest in, or are indeed opposed to, the political views the corporation is espousing. This Court should grant review to confirm, as *Austin* and *MCFL*

recognize, that there exists no such constitutional right. *See* Petition at 17-18.[2]

Second, contrary to respondents' contention, the holding of *Austin* does not turn on the distinction between ballot initiatives and candidate elections. *Austin* expressly rejected any reliance on the type of *quid pro quo* corruption associated with candidate campaigns. 494 U.S. at 659-660. *Austin* turned instead on the fact that corporate general treasury funds are amassed with state-created advantages and thus have the clear potential to distort the political marketplace:

> *Regardless of whether* this danger of "financial *quid pro quo*" corruption may be sufficient to justify a restriction on independent expenditures, Michigan's regulation *aims at a different type of corruption* in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.

Id. at 659-660 (citations omitted) (emphasis added). As established in the Petition, Montana's I-125 addresses precisely the same interest in avoiding misuse of the corporate general treasury that *Austin* recognized as compelling. Petition at 14-20.[3]

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[2] Indeed, as demonstrated in the Petition, corporate general treasury spending has been used to suppress, rather than promote, a full and open public debate on ballot issues in Montana. *See* Petition at 6-7.

[3] As explained fully in Judge Hawkins' dissent, the concurring opinions of Justices Stevens and Brennan in *Austin*

Finally, respondents err in arguing that I-125's segregated fund requirement is unjustified based on the alleged "health" of the Montana political process. Respondents point to the fact that Montana's overall voter turnout rate is higher than the national average as factual support for this contention. Nothing in *Austin*, *MCFL*, or *Bellotti*, however, suggests that a segregated fund requirement is unconstitutional unless a state's voter turnout is lower than the national average. Montana is not required to wait until voter turnout and participation decline to a disastrously low level before it may take action to enhance citizen confidence in the electoral process. *Cf. Munro v. Socialist Workers' Party*, 479 U.S. 189, 195-96 (1986) (rejecting requirement that "a State's political system sustain some level of damage before the legislature could take corrective action" in regulating ballot access).

In any event, Montana's voter turnout has, in fact, been declining over the past 20 years. Respondents' own exhibits showed that by 1996, Montana's voter turnout had dropped to its lowest level in any presidential election year since 1976, whether measured as a percentage of registered voters who turned out, or as a percentage of eligible (voting age population) voters. Ex. 32 at 2. *See also, e.g.*, Ex. 596, Bob Anez, "Official election turnout lowest since 1920," The Independent Record, Nov. 27, 1996 at 5A.

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do not stand for the proposition that a segregated fund requirement is unconstitutional in the ballot initiative context. Pet. App. at 29-31. In contending otherwise, respondents simply misread those concurrences.

Although voter turnout in elections has been steadily declining in Montana, that is not the only dimension of citizen participation worthy of examination. At least as important is whether citizens believe it is worthwhile to devote their personal energies to initiative campaigns in Montana. To address that question, defendant-intervenors presented testimony from several Montana citizens who had been intensely involved in efforts to enact a variety of initiatives in the face of corporate opposition fueled by overwhelming spending from the corporate checkbook. The testimony of Dr. Robert Shepard on his experiences in the I-115 tobacco initiative was typical:

> I haven't been on another initiative since then, even though there have been a few that I've supported with dollars and a few that I've supported intellectually, at least. I came away from that initiative with a really sour taste in my mouth. The process clearly doesn't work. One immensely wealthy corporation has the opportunity to come in and pay as much money as it needs to pay to influence the voters the way it wants to influence the voters.

Tr. 540, 10/15/98. C.B. Pearson, who testified as both an expert and fact witness based on his experience in Montana initiative campaigns, also stated:

> the overwhelming amount of money that a corporation can bring to a policy debate that's on the ballot initiative, actually prevents citizens from proposing ballot issues. They do not want to go through the experience of being – of having their voice drowned out, even though there are major issues, major policy issues that impact our society, like tobacco, they are just unwilling to propose an issue like that because they know

> that their chances of actual success are pretty minimal. They don't want to suffer the agony, like Bob Shepard has.

Tr. 1013, 10/20/98.

This direct testimony about citizen disillusionment concerning the initiative process was buttressed by survey research on the attitudes of Montana citizens toward corporate spending in the initiative process. Ex. 580A, 580B. More than three quarters of Montana voters believe that, if such spending is banned, ordinary people will have more of a voice in the political process, with a similar percentage believing that voters will be more likely to participate and vote on initiatives. Ex. 580B at 5 (Questions 13, 18). Over three-quarters of voters also say that they, themselves, will have more faith in the integrity of the initiative process in Montana as a result. Ex. 580B at 5 (Question 17).

The record here concerning the impact of unlimited corporate spending on public confidence in the electoral process goes far beyond any showing required by this Court in *Austin*. Indeed, neither this Court's decision in *Austin*, nor either of the lower court decisions in that case, made the slightest reference to any evidence that voter turnout or fall-off in Michigan had been affected by corporate expenditures. A segregated fund requirement, *Austin* held, was instead justified because the special benefits conferred by the corporate form "present the *potential* for distorting the political process." 494 U.S. at 661. That same potential, demonstrated even more clearly

here than in *Austin*, fully justifies I-125's segregated fund requirement for corporate expenditures.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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